

FILED BY CLERK

JUN -2 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

RICHARD M. SCHERT,

Appellant.

)  
)  
) 2 CA-CR 2009-0385  
) DEPARTMENT B  
)

MEMORANDUM DECISION

) Not for Publication

) Rule 111, Rules of  
) the Supreme Court  
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060127

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Isabel G. Garcia, Pima County Legal Defender  
By Robb P. Holmes

Tucson  
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Richard Schert appeals from the trial court's order denying his application to restore his civil right to carry a firearm. For the following reasons, we affirm.

## **Facts and Procedural Background**

¶2 On April 21, 2006, Schert pleaded guilty to resisting arrest, a class six felony, and driving while under the influence of an intoxicant, a class one misdemeanor. The trial court suspended the imposition of sentence and placed Schert on concurrent, supervised terms of probation, totaling five years. On October 25, 2006, the state moved to revoke Schert's probation for both convictions, alleging he had violated the conditions of his probation. Schert admitted the allegations, and the trial court revoked probation and sentenced him to a total of nine months' imprisonment, crediting him with one hundred thirty-four days of time served.

¶3 On October 15, 2009, Schert applied for restoration of his civil rights, including his right to possess firearms. The trial court granted the application in part, restoring Schert's civil rights "with the exception of the right to bear arms." This appeal followed.

## **Discussion**

¶4 Schert asserts the trial court erred in denying his motion to restore his right to possess firearms, arguing the court lacked the discretion to deny his application under A.R.S. § 13-912. The applicability of a statute is a question of law we review de novo. *See In re \$315,900.00 U.S. Currency*, 183 Ariz. 209, 211, 902 P.2d 351, 355 (App. 1995).

¶5 Section 13-912 requires a trial court to restore the civil rights of "[a]ny person who has not previously been convicted of any other felony," should that person make a proper application. *See State v. Buonafede*, 168 Ariz. 444, 446, 814 P.2d 1381,

1383 (1991). If an applicant “has been convicted of two or more felonies,” however, his or her application for restoration of civil rights is governed by A.R.S. § 13-905 or § 13-906, which give the court discretion to restore the applicant’s civil rights.<sup>1</sup> *Buonafede*, 168 Ariz. at 446, 814 P.2d at 1383; *see also* A.R.S. § 13-908.

¶6 Although Schert asserts in his opening brief that his conviction for resisting arrest was his first felony conviction, the record establishes otherwise. The presentence report states Schert previously had been convicted in Tampa, Florida of two felonies: aggravated assault on a police officer and “resisting arrest with violence.” The presentence report contained a notation that Schert “objected,” apparently asserting the charges had been dismissed as part of his placement in a diversion program. But, the Arizona probation officer confirmed in the presentence report that Schert had been placed on probation for those offenses and they had not been dismissed. Schert fails to acknowledge this evidence in his brief, much less explain why the trial court was not entitled to rely on his prior criminal history. Accordingly, he has given us no basis for disturbing the court’s conclusion that it had discretion to deny Schert’s application for restoration of his right to bear arms, or any reason to conclude the court abused that discretion. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain contentions of appellant with reasons therefor); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (appellant waived claim by providing insufficient argument).

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<sup>1</sup>The trial court referred to § 13-905 in its order when it should have referred to § 13-906. Section 13-905 governs the restoration of civil rights for those who have completed probation. Section 13-906 applies to those, like Schert, who have been discharged from imprisonment. Because these statutes are identical in all other respects, the court’s apparently inadvertent reference to the incorrect statute is immaterial.

¶7 For the foregoing reasons, we affirm the trial court's denial of Schert's application to restore his right to possess firearms.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge